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Notes, Comments and Digests

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NEGLIGENCE AND RES IPSA LOQUITUR

This note is an addition to the article in the July, 1942 issue.

In digesting Galer v. Wings Ltd. (page 198) it is mentioned (page 202) that the action of another passenger in the plane referred to was awaiting judgment. Two other passengers in fact brought separate actions but proceeded to trial together before Mr. Justice Dysart of the Court of King's Bench for Manitoba. His judgment was handed down July 14th, 1942 (Nysted v. Wings Ltd.) and Anson v. Wings Ltd., (1942) 3 D. L. R. 336, (1942) 3 W. W. R. 39. On the same as was before Montague J. in Galer v. Wings, but with additional evidence, Dysart J. applied against the defendant the doctrine of res ipsa loquitur, as had Montague J. but found, contra to Montague J. the defendant's explanation did not rebut the inference of negligence and that, therefore, the defendant was liable.

The learned trial judge said that the law which governed carriers by air is the same as that which governs carriers by land or sea; he found that the defendant was a common carrier, and that the plaintiff was a passenger for hire.

In respect of the plaintiff's luggage, the defendant was held to be an insurer of the safe delivery of the goods at their destination subject only to acts of God and of public enemies, the learned Justice holding, that this was an absolute liability followed from the fact that the defendant was the bailee as well as the carrier of the goods and so was responsible for their safe delivery.

In respect to the plaintiff's themselves, it was held that the defendant was not an insurer of their safety; that its duty towards them was to exercise adequate care in all that pertained to the sufficiency and operation of the vehicle; to carry them with all necessary care and that what constituted adequate care in each particular instance depended upon the cirmcumstances and could not be declared in any precise terms.

Then, as to burden of proof the learned trial judge as already indicated, held that the doctrine of res ipsa loquitur should be applied. The facts of the case were set out in some detail in reporting Galer v. Wings Ltd. (page 198-202). In brief, the defendant's aeroplane had only taken off the ground (in this case ice) and reached a height of about seventy-five feet when one of the propeller blades broke causing the engine to be torn from its fastenings and the plane fell to the ice in flames.

The accident happened on the morning of April 10, 1936. Near the end of the return flight, a considerable distance, on April 8th, the plane developed roughness, a term meaning the vibration of an aeroplane in any of its parts. Roughness may be caused by improper ignition, irregular flow of fuel, loose or cracked or broken parts of the engine and looseness or cracks in the propeller.

Every aeroplane has a certain amount of normal vibration with which an experienced pilot soon becomes familiar but it is the unusual roughness that is significant. One effect of roughness would be to increase the strain and jar upon the propeller. The roughness found on the return journey mentioned caused the pilot to suspect the propeller. He had flown the same plane for the six weeks previous to this time. He reported the roughness to the defendant's chief engineer and suggested that the propeller be checked. The chief engineer adopted the suggestion and had the propeller shipped to a local agent of the propeller manufacturers with particular instructions to look out for anything which might cause roughness and to remedy the same. He also gave instructions to his own staff of mechanics that the other parts of the aeroplane be checked for anything which might cause roughness. This latter was done and a complete new set of spark plugs was installed. Then before the agent of the propeller manufacturers could complete their checkup they were asked to confine the same to a check-up as to pitch and balance. They suggested a thorough check-up but were informed by an agent of the defendant that the propeller was needed for immediate use. Therefore, knowing nothing of the recent conduct of the propeller, they accordingly confined the check-up to pitch and balance, making minor corrections. The propeller was then again mounted on the aeroplane, which was flown sixty miles to another point. On this trip roughness reappeared and the pilot again reported the roughness both to the chief and to the local engineer. There was then a further general check-up of the plane and a ground test and subsequently an air test. On this air test roughness was still noticed. These check-ups, as the court found, were more than routine check-ups, and suggested that trouble existed and could not be located. The next morning the plane took another trip and its pilot on its return reported that roughness still persisted. Again the plane was subjected to inspection; the propeller was loosened and a thorough search was made for cracks in the shaft, hub and other parts of the same as well as in and about the engine and its fastenings. The court found that clearly cracks were suspected. Then, although the workmen did not seem to be wholly satisfied, without any air test, the plane set out on the journey which ended in the crash. From the time the roughness first appeared on April 8th till the crash on April 10th, the plane was flown approximately 600 miles which would require three or four hours of actual flight. The roughness was only intermittent and did not persistently recur. The defendant contented that the roughness must have been due solely to engine trouble, as distinct from propeller trouble, a contention which the trial judge found not convincing. There was another ground for suspecting this propeller. The blades were of a type which had been discontinued. The shape thereof caused undue strain upon the shank. Still further grounds for being particularly watchful of this propeller was the fact that aluminum alloy blades, as were the blades in this case, were widely known to have a tendency to develop cracks in operation. The court particularly commented on the absence of an air test before the final flight.

The court rejected the contention of the defendant that the defect if any, was a latent defect, finding that expert examination and analysis had set this question at rest; that the metal was of uniform quality throughout and free from defects of quality or manufacture.

As already indicated the court found first that the onus had been shifted to the defendant, and then that the defendant had not rebutted the inference of

negligence and was, therefore, liable. It is understood that the Galer case and the two now reported, all three arising out of the same accident, will come under review by the Provincial Court of Appeal.

In reporting the results of the trial of Malone v. Trans-Canada Air Lines it is mentioned (supra 204) that on review the Court of Appeal for Ontario dismissed the appeal of the defendant. The reasons for judgment on this appeal are now reported (1942 O. R. 453 and 1942, 3 D. L. R. 369). Two actions, Malone v. Trans-Canada Air Lines and Moss v. Trans-Canada Air Lines were combined at the trial and on the appeal. The trial, it will be remembered, was before jury. The questions submitted to and the answers given by the jury are set out at page 204. The husbands of the respective plaintiffs were paying passengers in the defendant's aeroplane which at night while making a routine landing at a specified air port, crashed, all passengers and all members of the crew being killed.

The plaintiff alleged negligence on the part of the defendant, workmen, servants and agents. To establish negligence they relied upon the maximum of res ipsa loquitur. Giving judgment for the Court of Appeal, the chief justice for Ontario said that the defendant's trans-continental passenger business was extensive and highly organized and well equipped, that it had regular schedules and daily carried many passengers long distances, and, almost invariably, in safety, that landing at air ports to discharge and take on passengers, for refueling and other purposes is a mere incident to this extensive business, that travel by aeroplane must now be regarded as a common means of transport, extensively used, and that with an experienced and careful pilot, proper equipment, the passengers have the right to expect that they will be carried in safety to their destination. The evidence had shown that the aeroplane used on the occasion in question was of high class workmanship, that it was regularly inspected and that it was in good condition during the flight which with other landings had occupied some hours. The landing in question was not being made because there was any emergency arising between air ports. Weather conditions, while wintery, were not abnormal, and were similar to conditions prevailing on the night before, when a landing was made at the same air port without difficulty. After departure from its last landing the aeroplane had been flying at an altitude of 8,000 feet. On approaching the airport this had been somewhat reduced in anticipation of landing. As the aeroplane, still high in the air flew over the airport and over the radio station which was some distance to the west of the port (the plane was coming from the east) there was no indication to the observers on the ground that there was anything wrong or unusual. The aeroplane proceeded, as was customary, for some distance west of the radio station, before turning to make its landing into the wind. The radio operator at the port had been in telephone communication to the pilot and had given him the usual information as to visibility and the direction and velocity of the wind. There was nothing said by the pilot suggesting any trouble either with himself or with the aeroplane or any anticipated difficulties in making a safe landing. Witnesses say that they heard the motor of the aeroplane as it passed over the airport going westerly and later after it had turned and was headed back towards the east, and that it sounded normal. At intervals they also saw the lights of the aeroplane, falling snow prevented a constant view of the lights. Then one of the witnesses sud-

denly saw a white light falling rapidly which he took to be the tail light of the aeroplane. He took the compass bearing of the falling light from the place where he stood and he said that the bearing he then took was not far off the course in which the wrecked aeroplane was later found. The evidence of those who saw and examined the wreck was that the aeroplane engine had been running and that the propellers had been revolving up to the time of the crash. Nothing was found, after close investigation, to indicate that the crash was due to any defect or failure in the aeroplane itself or in any of its parts. There was no ice on the wings. The barograph with which the aeroplane was equipped, and which records altitude was said by the defendant's witnesses to indicate that a distance of some 800 to 1000 feet above the ground there had been a precipitous descent of the plane as though it had dived or fallen. Evidently this precipitous descent did not continue to the ground. The aeroplane before it reached the ground travelled some short distance in a north easterly direction over and through the tree tops before it crashed. The trailing antenna of the aeroplane was found hanging from the top of the trees. A little farther on, twigs and branches from the trees were found broken. Still farther on the trunk of two trees had been broken off some distance from the tops. Again still farther was found one of the wings of the aeroplane which had been torn off apparently by a tree, and all of this before the final crash. The defendant's witnesses said that the aeroplane was at this time travelling in a horizontal position although steadily and rapidly coming to earth, and that at most it could have been a matter of seconds only from the time of the precipitous fall till the actual crash to the ground occurred. The court said that it might be a reasonable inference that for that brief a time there had been some degree of control, or recovery of control. The court also found that the course on which the aeroplane travelled among the tops of trees would not have taken it to the runway where the landing was to be made.

The learned chief justice in giving the reasons for judgment for the court of appeal pointed out that the above facts did not all appear in the plaintiff's case but were mainly from the evidence of the defendant's witnesses. The defendant had not asked for a non suit at the trial but had proceeded to call witnesses' evidence. The learned chief justice indicated that in any event, in his opinion, there could have been no non-suit "for the principle of res ipsa loquitur applied, and there was a case for the appellant to explain." And then added "the question whether it did so successfully was for the jury."

The court then considered the trial judge's charge to the jury. Dealing with question 1 (page 204) the appellant court found that the jury had not been properly instructed on the question of the burden of proof and that, therefore, the answer of the jury to the first question would not of itself support the judgment for the plaintiff, and that if this was the only finding for the plaintiff, then the defendants were entitled to a new trial on the ground of misdirection. Dealing with the second question the appellant court found nothing unfair towards the defendant in the charge to the jury and that the jury had drawn only reasonable inferences in arriving at their answers to the second and third questions; that it could not be said that the evidence was of a character which had left no grounds for reasonable inference of negligence; that its witnesses did not attempt to account for the accident nor to attribute it to any specific cause. They had suggested a number of things which might have caused it, as,

for example, some latent defect in the machine; "fatigue" of somt part; physical collapse of the pilot; some atmospheric condition. These were, however, little, if anything, more than a recital of the various things that may happen but rarely do happen and that of none of them was there anything outside the accident itself to suggest its presence here. There was also evidence that the operation of landing requires great skill and care on the part of the pilot. One of the dangers is that in maneuvering to come properly to the runway, the pilot may take too short a turn and "stall" his aeroplane and a sudden dive is apt to follow. The court said that it was impossible to say that the jury could not, on the evidence, have found as they evidently did, that the appellant had not given any reasonable explanation of the crash and that the proper inference was that the cause was the appellant's negligence.

Dealing particularly with the third question, it was contended by the defendant that the answers thereto could not be supported by the evidence. As to this the appellant court said that in a case where res ipsa loquitur applies, it would seem improper to require that the plaintiff make out such a case as would enable the jury to answer such a question. The court said "The plaintiff does not know in what the negligence consisted," and, added "if the defendant knows he probably will not tell". In concluding, the court said that giving to the jury's answer to the third question that fair and liberal interpretation in the light of the evidence and of the circumstances, there was a sufficient finding of negligence that was supported by the evidence, that the negligence, if there was negligence, on the part of the pilot, consisting in getting his aeroplane into a position of danger from which he could not extricate it and that from the jury's answer to question 3 could be taken the meaning that the pilot had allowed the plane while in his charge to get too low. Whether the decision will be further reviewed, that is by the Supreme Court of Canada or by the Privy Council remains to be seen.

The decision of the Supreme Court of Canada in the Ludditt case, (page 205) and of the Provincial Court of Appeal in the Quebec Airways case, (page 206) are still awaited.

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